

COMMENTS

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One Mineral at a Time: Shaping Transnational Corporate Social Responsibility Through Dodd-Frank Section 1502

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* J.D. 2013, University of Oregon School of Law. I would like to thank Professor Moshen Manesh for piquing my interest in business law, challenging my predispositions on corporate regulations, and providing insightful feedback on an earlier version of this article. I would also like to thank my parents for their ongoing support in whatever I choose to do whether it is playing baseball, moving to Australia, or attending law school. Finally, I would like to thank Allie Firestone for accompanying me into the woods.

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In June 2011, Apple Inc. stopped purchasing minerals for its electronics from the eastern parts of the Democratic Republic of the Congo (the “D.R. Congo”). Apple did so following the proposal of new federal legislation requiring companies to disclose “conflict minerals” used to manufacture their products. “Conflict minerals” include tin, tantalum, tungsten, and gold (also commonly referred to as the “3 Ts and gold”), derived from the D.R. Congo and adjoining countries.¹ The federal legislation was part of a humanitarian-activist agenda to dissuade corporations from purchasing minerals that subsidize armed groups—who control parts of the mining processes—and halt human rights violations resulting from those groups’ activities.

The D.R. Congo has a diverse set of humanitarian problems, and depending on whom you ask, there are various factors to blame: lack of infrastructure, poor medical care, and regional violence. In the past twenty years, the D.R. Congo has experienced two destructive wars involving six neighboring countries that resulted in overthrows of successive governments and human rights atrocities. Despite subsiding international tensions, armed groups are still thriving within the country, mostly due to the weak government’s inability to curb the fighting. One way the armed groups pay their troops’ salaries and feed their families is through the abundant and profitable mineral trade.

Up until ten years ago, the conflict mineral trade in the D.R. Congo had not received much attention from the United States despite many U.S. companies’ reliance on Congolese mineral production for various types of consumer product manufacturing. Previously, activist groups had tried to garner Western support by pointing to the D.R. Congo’s need for international aid and assistance to rebuild a war-torn nation, but their cause was largely ignored. In a new effort to engender international support for the humanitarian crisis and bring attention to the ongoing fighting, activist groups began a campaign

¹ Conflict Minerals, 77 Fed. Reg. 56,274 (Aug. 22, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b).

linking mineral production profits with funding for violent conflicts—a self-acknowledged adaptation of the Liberia-blood diamond awareness campaign that garnered widespread Western attention and support.

In 2010, as the U.S. Congress was enacting the Dodd–Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) to promote financial stability, activist groups successfully lobbied to include Section 1502. Section 1502 required the U.S. Securities and Exchange Commission (SEC) to implement disclosure rules for companies that use conflict minerals in their products.² Congress’s explicit intent was to stop U.S.-listed companies from subsidizing armed groups responsible for conflict in the D.R. Congo by shaming them into adopting more socially responsible mineral sourcing practices. Disclosure laws work by exposing a public company’s activities, which consequently informs shareholders and allows them to voice their humanitarian concerns to influence the company’s, otherwise profit-motivated, operations.

Even before the SEC regulations were finalized, companies such as Apple stopped indiscriminately purchasing from smelters whose minerals originated in the D.R. Congo. Instead Apple turned to the Conflict Free Smelter program (CFS), which identifies smelters whose raw materials do not originate from sources that fund conflict in the D.R. Congo.³ While CFS compliant smelters accept minerals from conflict-free areas in the D.R. Congo (primarily western areas because the conflict zones are concentrated in the eastern Congo), Section 1502 has led to a *de facto* ban by U.S.-listed companies on sources of tin, tantalum, tungsten, and gold originating from the eastern D.R. Congo.⁴ Sourcing smelters no longer buy minerals from affected regions, particularly the eastern D.R. Congo.⁵ The impact of this *de facto* ban has been catastrophic for the nation’s mining industry, even for those mining sources located away from the eastern

² U.S. SEC. AND EXCH. COMM’N, SPECIALIZED CORP. DISCLOSURE, <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml> (2013).

³ APPLE, SUPPLIER RESPONSIBILITY, <http://www.apple.com/supplierresponsibility/labor-and-human-rights.html> (last visited Nov. 2, 2013).

⁴ Laura E. Seay, *What’s Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy*, 14 (Ctr. for Global Dev., Working Paper No. 284, 2012).

⁵ *Id.*

Congo conflicts.⁶ Tens of thousands of lawful miners and millions of people that depend on artisanal mining in the DRC have seen their primary livelihood and source of sustenance disappear.⁷

Congress's goal when implementing Section 1502 was to encourage socially responsible corporate behavior and, in turn, remedy the D.R Congo's humanitarian crisis. One problem with this type of legislation is that social responsibility is an abstract concept. In *Corporate Social Responsibility in an Era of Economic Globalization*, Professor Cynthia Williams posits that (from among many choices) the predominant legal consensus is appropriate for examining corporate social responsibility.⁸ This consensus is premised on two assumptions: first, that a corporation's main purpose is to maximize shareholder value, and, second, the constraints of U.S. law are sufficient to address any concerns about the exercise of corporate power and to ensure that companies fully internalize all of the social and environmental costs of their business.⁹ In the transnational environment, however, Professor Williams identifies issues with the constraint assumption in the predominant legal consensus: What law should the company follow? Who sets the regulations? What types of regulations can and/or should be imposed? Professor Williams concludes that something more is needed in international business, in addition to U.S. domestic law, to manage U.S.-listed companies' social responsibility. One potential solution Ms. Williams suggests is monitoring U.S.-listed, transnational corporations through corporate disclosures and increased transparency.¹⁰

The policy question this Article will address is whether Congress can shape transnational corporate social responsibility through disclosure requirements. In reaching a conclusion on that overarching policy question, the first question this Article asks is whether the new disclosure provisions change the social behaviors of companies involved in mineral production. Assuming that companies do adjust their behavior, the second question is whether those new behaviors achieve desired social outcomes. In other words, assuming that

⁶ *Id.* at 13–16.

⁷ *Id.* at 4.

⁸ Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 711–14 (2002).

⁹ *Id.* at 708.

¹⁰ *Id.* at 777.

disclosure laws can change corporate behavior, what is the feasibility of drafting a disclosure law that also produces socially acceptable results?

This Article proceeds in three parts. Part I looks at the D.R. Congo's history, the significance of mineral resources to the country, and the actions leading up to the enactment of Section 1502. Part II explains the basic requirements of Section 1502. In addition to the statutory provisions, I examine the legislative history to see what social and business factors motivated this bill. Then, I examine the regulations in the context of different academic perspectives on corporate social responsibility. I find that while Section 1502's disclosure requirements did influence corporate behaviors, for various reasons those new behaviors did not alleviate the D.R. Congo's humanitarian crisis. Part III discusses whether there is a problem with the predominant legal consensus on corporate social responsibility in transnational corporations. This section highlights Section 1502's impact on mining in the D.R. Congo and disclosure effects on reporting companies. This Article concludes that the new disclosure laws are effective in creating a more transparent corporate operation, which allows shareholders to demand conflict-free products and forces companies to comply with those demands. Unfortunately, while disclosure laws promote responsible behaviors, they have not alleviated the greater humanitarian concerns in Central Africa, such as poor medical care, widespread displacement, and attacks on civilians. In fact, in addition to the steep implementation cost to U.S. companies, Section 1502 has had unintended negative effects on the D.R. Congo due to a *de facto* boycott on the country's principal economic resources. Something more is needed. To the extent that disclosure laws are altering corporate behaviors but failing to remedy targeted social and economic issues, Congress needs new laws¹¹ that promote a socially responsible corporate landscape. In my conclusion I suggest additional steps Congress may take in future legislation.

¹¹ Not necessarily more complex disclosures, rather disclosures that focus on addressing comprehensive reform. Reports of community contributions, work with nonprofit partners, and international bodies. For example, a disclosure regarding group(s) a corporation is working with to certify their socially responsible mining practices would be a low cost means to encourage socially responsible corporate behavior.

I CONFLICTS + MINERALS

*“Locally, everybody depends on mining!”*¹²

There are widely varying perspectives regarding the root causes and institutional problems in the D.R. Congo mining industry and economy. Activist groups, interested in drawing attention to the humanitarian crisis in Central Africa have used negative political campaign tactics to portray conflict minerals miners as gruesome killers. To say that all of the violence caused in the D.R. Congo stems from trade in conflict minerals, however, paints an incomplete picture of the country’s actual social and political dynamics. While there is some credence to activists’ charges, their shocking messages and the actual statistics do not always add up.¹³ First, this section presents the D.R. Congo, its history, and its mining industry. Second, this section highlights statistical data on mining in the D.R. Congo, and explains which minerals Congress has defined as “conflict minerals” in Section 1502. Finally, this section introduces the players in the past decade that have shaped the conflict mineral discussion.

A. The Democratic Republic of the Congo

The D.R. Congo is a country located in Central Africa. It is the second largest country in Africa, by area, and the eleventh largest in the world.¹⁴ With a population of over 73 million (July 2012 est.), the D.R. Congo is the nineteenth most populous nation in the world.¹⁵ The economy is slowly recovering from decades of decline; corruption since independence in 1960, and two major wars that began in 1997 have contributed to reduced national growth, increased reliance on foreign debt, and the deaths of more than five million people from violence, famine, and disease.¹⁶

¹² Seay, *supra* note 4, at 8.

¹³ Séverine Autesserre, *Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences*, 111 AFR. AFF. 443, 210–11 (2012) (As Séverine Autesserre notes, despite the international community’s overwhelming focus on conflict minerals, only about 8% of Congolese conflicts are over natural resources.).

¹⁴ CENT. INTELLIGENCE AGENCY, *Congo, Democratic Republic of the*, THE WORLD FACTBOOK (2011), <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>.

¹⁵ *Id.*

¹⁶ *Id.*

The D.R. Congo has been mired in conflict for the better part of the last two decades. The First Congo War, which took place in the former state of Zaire, was the result of unstable neighboring countries and spillover violence involving refugees from the 1994 Rwandan genocide.¹⁷ The net effect was a new name, the D.R. Congo, and a new authoritarian ruler, Laurent-Désiré Kabila. The Second Congo War broke out in August 1998, and within weeks, six other countries had been drawn into the conflict along with scores of new militias in a battle for resources and regional power.¹⁸ The Second War officially ended in July 2003 when most foreign troops had withdrawn, yet scores of armed groups remained and hostilities persisted.¹⁹ As foreign troops withdrew, local combatants began looking to their territory within the country for sustenance, including enriching themselves at the cost of others' livelihood and safety.²⁰

The International Rescue Committee (IRC), which carried out a study on the Second Congo War, said the war had caused upwards of 3.9 million deaths, more than any other conflict since World War II.²¹ According to the survey, less than 10% were attributable to violence.²² Most of the deaths were due to easily treatable diseases—malaria, pneumonia, and malnutrition were the top killers.²³ Healthcare is still inaccessible, and the country has the lowest per capita spending on healthcare of any country in the world, an average of just \$15 per person per year.²⁴

The D.R. Congo's economy depends heavily on its mining industry.²⁵ Some armed Congolese and foreign groups have fought to control the mineral trade in the country's eastern regions, and some

¹⁷ *Id.*

¹⁸ *Congo's Curse*, IRIN (July 20, 2006), <http://www.irinnews.org/Report/61006/CONGO-Congo-s-Curse>.

¹⁹ *Id.*

²⁰ *Id.* (Mobutu, ruler of Zaire during the First Congo War, himself once asked FAZ soldiers why they needed pay when they were provided weapons.).

²¹ Joe Bavier, *Congo war-driven crisis kills 45,000 a month: study*, REUTERS (Jan. 22, 2008), <http://www.reuters.com/article/2008/01/22/us-congo-democratic-death-idUSL2280201220080122>.

²² Benjamin Coghlan et al., *Mortality in the Democratic Republic of Congo: An Ongoing Crisis* 1 (2007), http://www.rescue.org/sites/default/files/migrated/resources/2007/2006-7_congomortality_survey.pdf [hereinafter Coghlan].

²³ Bavier, *supra* note 21.

²⁴ *Id.* (compared to \$6,000 per person per year in the United States).

²⁵ Seay, *supra* note 4, at 8 (“[The mining sector] accounts for 80% of the exports, 72% of the national budget and 28% of GDP according to the latest available statistics.”).

groups that engage in mining activities are also responsible for civilian-directed violence.²⁶ Not all violence in the eastern D.R. Congo, however, is related to the mineral trade.²⁷ And violent groups do not control all of the mines.²⁸ Moreover, despite the violence, the eastern region is still dependent on mineral trading as a livelihood.²⁹ For many Congolese families, “mining activity is generational and represents their only potential economic livelihood.”³⁰ The violence-conflict mineral connection focused international attention on the D.R. Congo, but any policy concentrated solely on ameliorating conflict mineral violence falls short of addressing chief causes of the country’s plight.

B. Conflict Minerals

“Conflict mineral” is an artful term, similar to the “blood diamond” moniker used in Liberia by activist groups to engender political and monetary support from the West. There is some truth to the term, as conflict minerals are physically connected to the D.R. Congo and finance certain armed groups within the country. Their abundance in the D.R. Congo makes them a natural symbol for the country, and their abundant use in modern technology connects them to the western world.

United States legislation defines “conflict minerals” as cassiterite, columbite-tantalite, wolframite, and gold (more commonly known by their derivatives as tin, tantalum, tungsten, and gold) and other minerals the Secretary of State determines to be financing conflict in the D.R. Congo and its neighboring countries.³¹ Currently, only the three T’s and gold are determined to be funding conflict: Tin, “used in alloys, tin plating, and solders for joining pipes and electric circuits”; Tantalum, “used in electronic components, including mobile telephones, computers, video game consoles, and digital cameras, and as an alloy for making carbide tools and jet engine components”; Tungsten, “used for metal wire, electrodes, and contacts in lighting, electronic, heating, and welding applications”; and Gold, “used for

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Conflict Minerals, 77 Fed. Reg. 56,274 (final rule Sept. 12, 2012) (to be codified at C.F.R. pts. 240 & 249b).

making jewelry and is used in electronic, communications, and aerospace equipment.”³² The D.R. Congo’s supply of these minerals is believed to be enormous. The D.R. Congo contains an estimated 80 percent of the world’s tantalum reserves.³³ Gold deposits remain underexplored, but are also estimated to be vast.³⁴

With the mineral trade constituting such a large portion of the country’s economy, activist groups posited that enlisting Western support to stop conflict mineral funding was the most effective and direct means to attract attention and help the country recover from its prolonged depressed state.³⁵ The goal of these groups—to end and prevent conflict in Africa—has remained unchanged, but their strategy for rallying Western support has shifted dramatically. Early advocacy focused on the internal violence and humanitarian crisis and called for a multi-pronged approach to solve the complex problems within the D.R. Congo. In 2009, the focus shifted away from complex solutions, and instead connected the Congolese crisis to Westerners in a way they could identify with. One group, the Enough Project, cleverly linked the three Ts and gold to the symbol of Western electronic achievement, the cell phone.³⁶

C. Western Involvement

Promoting responsible corporate practices in the D.R. Congo is a recent phenomenon. Prior to the late 2000s, there was little attention on the country’s situation.³⁷ That indifference began to fade in 2007,

³² *Id.* at 55,283–84.

³³ *Conflict Minerals*, FOREIGN AND COMMONWEALTH OFFICE, <https://www.gov.uk/conflict-minerals> (last visited Oct. 8, 2013) [hereinafter FOREIGN AND COMMONWEALTH OFFICE]; *but see* Andrew Behl, Marci McCall, Sarah Spring, HEWLETT-PACKARD: UNDERSTANDING CONFLICT MINERALS 2 (2011) (citing that the D.R. Congo might have less of those resources: 18% of global tantalum production, 4% of tin, 3% of tungsten, and 2% of gold). Since predicting the supply of minerals that have not yet been discovered is difficult, these estimates vary dramatically and tend to vary depending on the source of information and reasons for reporting.

³⁴ FOREIGN AND COMMONWEALTH OFFICE, *supra* note 34.

³⁵ *Conflict Minerals*, THE ENOUGH PROJECT, <http://www.raisehopeforcongo.org/content/initiatives/conflict-minerals> (last visited Dec. 2, 2012) (“The movement is growing, with celebrities like Emmanuelle Chriqui, Emile Hirsch, Ryan Gosling, Iman, Julianne Moore, Brooke Smith and Ken Baumann adding their voices.”).

³⁶ John Prendergast, *Can You Hear Congo Now? Cell Phones, Conflict Minerals, and the Worst Sexual Violence in the World*, THE ENOUGH PROJECT 2 (Apr. 2009), <http://www.enoughproject.org/files/Can%20Your%20Hear%20Congo%20Now.pdf>.

³⁷ Seay, *supra* note 4, at 8.

when the Enough Project “was created with the primary purpose of developing an American constituency around ending and preventing conflict in Africa.”³⁸ Early efforts by the Enough Project favored acknowledging the complex issues facing the Congolese people and advancing a comprehensive solution.³⁹ This initial approach did not receive enduring support.⁴⁰ With a modified message and new media tactics, however, the Enough Project turned Western attention to the conflicts in the D.R. Congo.

In 2009, the Enough Project shifted its focus to “conflict minerals” in an attempt to galvanize grassroots activists around the D.R. Congo humanitarian crisis and built a broad Western constituency.⁴¹ The Enough Project released the strategy paper “*Can You Hear Congo Now? Cell Phones, Conflict Minerals, and the Worst Sexual Violence in the World,*” which directly linked Western consumers’ ownership of electronics to sexual and other forms of violence in the D.R. Congo.⁴² The activists’ focus on consumer electronics, particularly cell phones, as a means of tying consumers to the crisis in the D.R. Congo was effective in making people feel that they were connected to the problem and could make a difference.⁴³ Following the adoption of this strategy, advocacy groups proliferated, media coverage of the D.R. Congo increased, and donations poured into organizations working in the region.⁴⁴

The Enough Project also pursued relationships with several leading corporations that did business in the D.R. Congo. The most responsive of these corporations was Hewlett-Packard, which maneuvered to the forefront of conflict mineral awareness among multinational corporations.⁴⁵ Industry watchdog groups ranked companies based on the elimination of conflict minerals from their processes. Most companies that received high marks worked on “Stakeholder Engagement,” defined as working with an Enough Project-led coalition, which was, and still is, one of the indicators

³⁸ *Id.* at 9.

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ *Id.*

⁴² Prendergast, *supra* note 36, at 2.

⁴³ Seay, *supra* note 4, at 9.

⁴⁴ *Id.*

⁴⁵ *Id.*

used to determine rankings.⁴⁶ Shortly thereafter, other electronics giants like Apple and Intel followed Hewlett-Packard's lead, instituting a transparent and conflict-free supply chain for their own products.

The Enough Project's association between cell phones, mining, and violence in the D.R. Congo was a useful, simplified message to capture Western attention, while the actual link is much more tenuous. Moreover, the Congolese economy is largely dependent on mineral trading, both violent and non-violent. As several authors note, "tantalum mining has become a critical mode of survival for many at the grassroots" level of Congolese society.⁴⁷ In terms of fostering dynamic social change, it remains to be seen whether the attention garnered by the Enough Project's marketing efforts will result in resources for essential infrastructure and public support projects. Regardless, the Enough Project's efforts grabbed Congress's attention and produced legislation that now requires companies to make their mineral supply chains more transparent.

II DODD-FRANK CONFLICT MINERAL DISCLOSURE

*"[W]hen there is but a single regulator, such that exit by the regulated is no longer an option, an essential check on excessive regulation is lost."*⁴⁸

The legislative mandate known as Section 1502 of Dodd-Frank was a result of the Enough Project's campaign to draw attention to the conflicts in Africa and the D.R. Congo. Unfortunately, because the Enough Project's initial, more comprehensive social programs failed to gather support, the new legislation more closely reflects the Enough Project's revamped approach linking armed conflict in the D.R. Congo to cell phones and other electronics. Thus, rather than focusing on treatable diseases, inadequate medical treatment, and other direct causes of deaths, the bill instead focused on a less complex, but readily identifiable link, conflict minerals. While

⁴⁶ *Getting to Conflict Free: Assessing Corporate Action on Conflict Minerals*, THE ENOUGH PROJECT (Dec. 2010), http://www.enoughproject.org/files/publications/corporate_action-1.pdf.

⁴⁷ Seay, *supra* note 4, at 8 (citing Stephen Jackson, *Making a Killing: Criminality and Coping in the Kivu War Economy*, 93/94 REV. AFR. POL. ECON. 515, 515 (2002)).

⁴⁸ Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1795 (2011).

corporations who trade in minerals from the D.R. Congo have already adjusted their supply-chains, it remains to be seen how these new regulations will solve the ongoing humanitarian crisis.

A. Legislative Mandate

The title of Section 1502(a) states the “Sense of the Congress on Exploitation and Trade of Conflict Minerals Originating in the Democratic Republic of the Congo,” which reflects Congress’s intention to further the humanitarian goal of ending the violent conflict in the D.R. Congo. Despite this noble goal and some measure of success, many questions remain about the ultimate impact of solving diminishing⁴⁹ conflict issues while sidestepping the greater infrastructure and social funding difficulties facing a country ravaged by two decades of war. Regardless, the SEC regulations authorized by Section 1502 further explain that the involvement in mineral trading by armed groups⁵⁰ is helping to finance the conflict and that the humanitarian crisis in the region warrants the disclosure requirements.⁵¹

Section 1502 does not mesh with Dodd-Frank’s primary focus on domestic financial stability and reform. Instead, it mandates the SEC to impose disclosure requirements on U.S.-listed companies that use, or potentially use, conflict minerals⁵² from the D.R. Congo or an adjoining country⁵³ in their products. The legislative history of

⁴⁹ Coghlan, *supra* note 22, at 1 (this is not to marginalize the effects of conflict around mines, which have led to horrific instances of rape and forced servitude. However, in the time since the Second War ended, crimes related to violence have subsided substantially, with some estimates placing the decline at 30% per year).

⁵⁰ Conflict Minerals, 77 Fed. Reg. 56,274, 56,364 (final rule Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b). (“[A]rmed group” means a group that is identified as a perpetrator of serious human rights abuses in the most recently issued annual Country Reports on Human Rights Practices relating to the Democratic Republic of the Congo or an adjoining country for the year the annual report is due).

⁵¹ *Id.* at 56275 (“It is the sense of the Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender- based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).”).

⁵² *Id.* at 56364. (“conflict mineral” means “(i) [c]olumbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives . . . ; or (ii) [a]ny other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.”).

⁵³ *Id.* (“adjoining country” means “a country that shares an internationally recognized border with the Democratic Republic of the Congo”).

Section 1502 explains that Congress was concerned with human-rights objectives and preventing the proliferation of minerals that are obtained at the Congolese people's expense.⁵⁴ Notably, however, neither Section 1502 nor the SEC's regulations impose sanctions for using minerals that are not "conflict free"; the only affirmative requirement is disclosure.

B. Disclosure Requirements

On September 12, 2012, pursuant to Section 1502, the SEC adopted its final rules that require companies to disclose their use of or involvement with four types of minerals,⁵⁵ if the minerals originated in the D.R. Congo or an adjoining country. The rules apply to certain issuers (U.S.-listed companies) that file reports with the SEC under Exchange Act Sections 13(a) or 15(d).⁵⁶ The disclosure requirements for conflict minerals are further broken into three steps.

In the first step, a company must determine whether it is subject to the Conflict Minerals Statutory Provision. A company is subject to the provision if conflict minerals are "necessary to the functionality or production of a product manufactured, or contracted to be manufactured."⁵⁷ If a company does not meet the definition, then no disclosure is required.⁵⁸ If a company does meet this definition, it must move on to step two.⁵⁹

The second step requires a company to conduct a reasonable country-of-origin inquiry for all of its conflict minerals to determine whether they originated in the D.R. Congo. If the minerals were found not to have originated in the D.R. Congo, then a company would have

⁵⁴ *Id.* at 56,275.

⁵⁵ See Conflict Minerals, *supra* note 51 (for a list of the current "conflict minerals").

⁵⁶ 15 U.S.C. §§ 78m(a) and 78o(d), respectively. The Securities Exchange Act of 1934 was created to provide governance of securities transactions on the secondary market (after issue) and regulate the exchanges and broker-dealers in order to protect the investing public. *Definition of 'Securities and Exchange Act of 1934,'* INVESTOPEDIA, <http://www.investopedia.com/terms/s/seact1934.asp#ixzz2DfQ8zyqj> (last visited Dec. 2, 2012). The SEC was established from the 1934 Act. *Id.* All companies listed on stock exchanges must follow the requirements set forth in the Securities Exchange Act of 1934. *Id.* In other words, every publically traded U.S. company must comply with the new SEC conflict mineral rules of disclosure.

⁵⁷ Conflict Minerals, 77 Fed. Reg. 56,274, 56,285 (final rule Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b).

⁵⁸ *Id.* at 56,287–88.

⁵⁹ *Id.*

to report this conclusion, as well as the process used to come to this conclusion, on its annual report and Internet website.⁶⁰ A company would then have no further disclosure requirements.

A third step—preparing a Conflict Minerals Report⁶¹—is required if any of three situations arise. The three situations which may constitute a need to prepare a Conflict Minerals Report are: (1) a company determines that its conflict minerals did originate in the D.R. Congo, (2) the company is unable to determine that its conflict minerals did not originate from D.R. Congo, or (3) the company determines that its conflict minerals were from recycled or scrap sources. The Conflict Minerals Report process includes obtaining a certified independent private sector audit report, furnishing such information as an exhibit to the company’s annual report, and posting the information on its website.⁶² For any products containing conflict minerals obtained from the D.R. Congo, but that do not “directly or indirectly finance or benefit armed groups,” a company would be permitted to label the product “DRC conflict free.”⁶³ However, for products containing conflict minerals, for which a company was unable to determine whether they “directly or indirectly finance[d] or benefit[ed] armed groups,” a company would be required to label them “not DRC conflict free.”⁶⁴

Despite the length of the new regulations, 356 pages in all, there is still plenty of ambiguity. For instance, what makes conflict minerals “necessary”? The SEC admits that they “do not propose to define when a conflict mineral is necessary to the functionality or production of a product.”⁶⁵ Suggested interpretations of “necessary” include an NGO proposal for cases where conflict minerals are “intentionally added”; two bill sponsors advised “all uses of conflict minerals . . . except . . . unintentionally included” minerals; and the SEC’s negative definition, “conflict minerals necessary to the functionality or production of a physical tool or machine used to produce a product would not be considered necessary to the production of the product

⁶⁰ See 77 Fed. Reg. 56,274, 56,316–33 (final rule Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b) (for an explanation of the Conflict Minerals Report).

⁶¹ See *infra* note 62 (for an explanation of the Conflict Minerals Report).

⁶² 77 Fed. Reg. 56,274, 56,311–16 (final rule Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

even if that tool or machine is necessary to producing the product.”⁶⁶ The many plausible definitions and the SEC’s refusal to settle on one add to the confusion, which may lead to higher costs for companies, keep them from addressing the conflict-mineral issue, or incentivize them to avoid purchasing minerals from the D.R. Congo altogether.

Even before Congress enacted Section 1502, an active corporate and international debate emerged over how to increase corporate accountability for the tragedies in the D.R. Congo. Only recently did the option to replace market demands with a mandatory federal law become a possibility. Although lawmakers likely have good intentions, the Congressional debate on Section 1502 was abbreviated,⁶⁷ and the resulting SEC requirements are a one-size-fits-all law.⁶⁸ The estimated cost to corporations of implementing the new SEC disclosure provisions is approximately \$4 billion,⁶⁹ although some estimates go as high as \$7.98 billion,⁷⁰ and all annual reporting requirements went into effect on January 1, 2013.⁷¹

C. Impact on Transnational Corporate Social Responsibility

Some would argue that Section 1502 reflects a necessary addition to the predominant legal consensus on corporate social responsibility in transnational corporations. Where international law might otherwise have been inadequate, shareholders can now access more information and voice concerns to hold profit-motivated corporations accountable for their business decisions. In contrast, detractors of federal corporate legislation would contend this is opportunistic, incomplete, and inexcusable federal governance in the international

⁶⁶ *Id.*

⁶⁷ Despite the two-year period (December 2010–August 2012) between when the SEC proposed rules and adopted the final rules, the three-step disclosure process did not change.

⁶⁸ Although comments on the proposed rules suggested varying applicability depending on company size, type of product, or quantity of conflict minerals, the disclosure requirements will apply equally for all U.S. listed companies. Conflict Minerals, 77 Fed. Reg. 56,274, 56,278 (final rule Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b).

⁶⁹ Daniel M. Gallagher, Commissioner Sec. & Exch. Comm’n, Statement at SEC Open Meeting: Proposed Rule to Implement Section 1502 of the Dodd-Frank Act—the “Conflict Minerals” Provision (Aug. 22, 2012) (transcript available at <http://www.sec.gov/news/speech/2012/spch082212dmg-minerals.htm>).

⁷⁰ Seay, *supra* note 4, at 12.

⁷¹ Conflict Minerals, 77 Fed. Reg. 56,274, 56,275 (final rule Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b).

arena.⁷² They might be right. To the extent that the problems in the D.R. Congo are actually a lack of infrastructure and poor medical care, Section 1502 does not provide a viable solution because conflict minerals do not primarily create those problems. Further, the timing of Section 1502 is questionable—rushed through Congress by activist groups during a tough economic time, when passing legislation becomes easier. Finally, corporate disclosures are not without consequence. They put the United States at an economic disadvantage *vis-à-vis* other countries' security exchanges.⁷³ Without a doubt, some good will come from Section 1502; companies preemptively supported conflict-free supply chains and other socially impactful projects. However, Congress needs to be circumspect when passing disclosure laws—there are positive *and* negative effects that accompany corporate regulation.

1. Corporate Social Responsibility in a Transnational Environment

To evaluate whether corporate actions are socially acceptable this article utilizes the predominant legal consensus on corporate responsibility in the United States—corporations that operate within American laws are considered socially responsible. In her article, *Corporate Social Responsibility in an Era of Economic Globalization*, Professor Williams posits that (from among many choices) the predominant legal consensus is appropriate for examining corporate social responsibility in domestic situations.⁷⁴ However, in transnational situations, Professor Williams questions the theory's efficacy as a complete corporate social responsibility theory.

There are three essential premises on which the predominant legal consensus on corporate social responsibility rests. The first premise is that the corporation's main purpose is to maximize shareholder

⁷² Bainbridge, *supra* note 48, at 1785–86 (describing how the burst of an economic bubble causes an upswing in populist anger and accompanying intense public pressure for legislative action, which gives well-positioned policy entrepreneurs a window to market their regulatory solutions).

⁷³ Professor Bainbridge argues that if a state were to make disadvantageous changes to its law, some companies listed there would leave and other companies would not decide to move there. There is substantial evidence that state competition tends to lead to efficient results and positive shareholder returns. This finding strongly supports the corporate race-to-the-top hypothesis. By eliminating disadvantageous disclosure laws, the United States stays ahead of the competition from other securities exchanges lurking as potential competitors for U.S.-listed businesses. *See id.*

⁷⁴ Williams, *supra* note 8, at 712–13.

wealth.⁷⁵ The second premise is that—given the purpose of the corporation is to generate profits—the only accountability of the corporation is to shareholders (as opposed to stakeholders—including employees—who are considered outsiders).⁷⁶ This premise accepts a shareholder-primacy viewpoint, although this viewpoint may not fully capture all of a public corporation’s inner workings.⁷⁷ The third premise is that a corporation is socially responsible when it stays within the constraints of U.S. law.⁷⁸ In other words, our laws sufficiently address any concerns about the exercise of corporate power, and society will benefit most from profit-focused entities that stay within that moral fabric of U.S. law.⁷⁹

Professor Williams sees three issues with the predominant corporate ideology in the transnational environment. First, the transnational environment undermines the ability of sovereign nations to impose substantive, proactive limits on economic actors such as transnational corporations and capital market participants.⁸⁰ Second, since there is no international sovereign, the power of nations to tax corporate enterprises and spend money on social welfare benefits to address distributive concerns arising from globalization is waning, although it is far from fully diminished.⁸¹ Third, when there are instances that can be understood as a breakdown in corporate social responsibility, law is often insufficient to provide redress.⁸² Therefore, Professor Williams proposes that there is a need for something more in transnational business to compliment optimistic reliance on the

⁷⁵ Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 448 (2001).

⁷⁶ *Id.* at 441.

⁷⁷ For example, Professors Margaret Blair and Lynn Stout have suggested that as an economic matter, the fundamental structure of a public corporation is an instance of team production. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 (1999). The team production model requires firm-specific commitments from employees, managers, and even the communities where the businesses are located. *Id.* at 275. All of the constituents contribute inputs that are necessary for the corporation’s success, and receive part of the benefits from the wealth created. *Id.* at 285.

⁷⁸ Williams, *supra* note 8, at 714.

⁷⁹ MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962); *see also* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

⁸⁰ Williams, *supra* note 8, at 725–36.

⁸¹ *Id.* at 746–50.

⁸² *Id.* at 750–64.

theory of shareholder wealth maximization and the constraints of domestic law.

a. "Something More"

One proposition for filling the void in international law is increased corporate disclosures, which would not change how corporations to operate, but would implement a duty on companies to provide shareholders with more information about their operations. Disclosure laws are used as a shaming mechanism. By alerting shareholders to offensive corporate practices, the laws can indirectly modify substantive corporate practices through shareholder demands.⁸³ Disclosure laws can succeed to the extent that they engender enough shareholder displeasure to force a change in corporate activities.⁸⁴

Professor Williams anticipates that disclosure laws for transnational businesses would increase transparency: aligning public interest⁸⁵ and shareholder demand and, therefore, corporate accountability without completely reshaping the predominant model of corporate social responsibility. In other words, the shareholders' awareness of a company's actions may instill some humanistic concerns into an otherwise profit-focused industry and ruthless global market. For example, in the shareholder say on pay debate, proponents argued that shareholder advisory opinions on corporate officer pay would help boards of directors overcome psychological barriers and negotiate pay packages with CEOs more effectively on behalf of shareholders.⁸⁶ Similarly, shareholder demand for conflict-mineral-free products may create leeway for corporate officers to focus on social accountability measures rather than profit-maximization, while staying within the shareholder-primacy model of corporate governance.

Skeptics of federally mandated disclosure laws see the federal regulations as upsetting corporate market efficiency by tinkering with the shareholder-stakeholder balance. Professor Steven Bainbridge's

⁸³ See, e.g., Alison Torbitt, *Implementing Corporate Climate Change Responsibility: Possible State Legislative and Sec Responses to Climate Change Through Corporate Law Reform*, 88 OR. L. REV. 581 (2009) (for an example of how SEC social disclosures can impact corporate climate change responsibility).

⁸⁴ *Id.* at 616.

⁸⁵ However minor that interest may be, the goal is to incorporate the interest while once again highlighting the importance of transparency law aspirations.

⁸⁶ Randall S. Thomas et al., *Dodd-Frank's Say on Pay: Will It Lead to a Greater Role for Shareholders in Corporate Governance?*, 97 CORNELL L. REV. 1213, 1228 (2012).

critique of “therapeutic” corporate governance laws is that they ostensibly require disclosure but are clearly intended to change underlying behavior.⁸⁷ Further, since activist-policy groups tend to be critics of markets and corporations, their laws often include regulation that penalizes useful and proven models and practices, and, more generally, suppresses risk-taking by punishing negative results and minimizing the rewards for success.⁸⁸

In line with Professor Bainbridge’s critique, Section 1502 has nothing to do with the financial crisis that supported its passage. To the extent that Section 1502 was passed after groups were already tracking conflict mineral supply chains, it epitomizes excessive disclosure laws passed during times of economic boom and bust, which place U.S.-listed companies at a disadvantage *vis-à-vis* companies on other security exchanges.⁸⁹ There is ample evidence that shows this was the case. A number of efforts were underway prior to the enactment of Section 1502 that included consultations with local civil society leaders and Congolese mineral trade exports. For example, an effort called PROMINES (an acronym for improving and strengthening the Congolese mining industry) involving the Congolese government, the World Bank, and the mining industry had made great strides toward improving transparency and accountability.⁹⁰ This effort was out of the public view, internationally low-key, and had a high probability of success until confusion set in surrounding the enactment of Section 1502.⁹¹ By utilizing methods other than corporate regulation, the efforts could have permitted a viable solution to the conflict-mineral dilemma without further burdening U.S. companies and stifling trade.

*b. Corporate Response to the SEC’s Conflict Mineral Disclosure
Rules*

Disclosure laws are effective only to the extent that companies act in conformance with the law’s underlying policy goals. The SEC

⁸⁷ Bainbridge, *supra* note 49, at 1797.

⁸⁸ *Id.* at 1787. While Bainbridge is concerned with the issues of internal corporate governance and state versus federal regulation, surely, quack social policy legislation that removed corporate decision making and replaced it with a one-size-fits-all federal law would irk him in a similar fashion.

⁸⁹ *Id.* at 1819.

⁹⁰ Seay, *supra* note 4, at 20.

⁹¹ *Id.*

regulations provide evidence that disclosure laws can effect substantive changes in transnational corporations. In 2010, the SEC released its proposed disclosure regulations pursuant to Section 1502. Companies using minerals in the D.R. Congo region responded even though the SEC's would not release its final regulations for another two years.

Hewlett-Packard started a movement to use conflict-free sourcing programs, and transnational corporate superpowers Intel, Apple, and Boeing, among many others quickly adjusted their sourcing practices as well. The amount of groups promoting responsible sourcing has also increased. In all, there has been a huge shift by U.S.-listed companies to practicing conflict-free mineral sourcing.⁹² Of course the threat of disclosures and shift to more responsible practices does not prevent companies from putting a positive spin on their efforts; Hewlett-Packard boasts its support for the Solutions for Hope project, which "achieved the first validated source of conflict-free tantalum ore from [the] D.R. Congo,"⁹³ and Apple proclaims it is at the forefront of an effort "to help its suppliers source conflict-free materials."⁹⁴ Section 1502 and the subsequent SEC regulations have substantially altered corporate activities regarding conflict mining. However, insofar as the ultimate concern is the law's impact on the humanitarian crisis in the D.R. Congo, the results have been far less impressive.

2. *Problems with Reflexive Federal Legislation*

Most activist groups' marketing strategy is relatively straightforward: identify a problem and rally public support to your cause. Unfortunately, mass attention grabbing often means that complex policy and reasoned discussion are reduced to a basic message and sound bites. The Enough Project put the D.R. Congo's

⁹² The most easily identifiable indicator might be the stark difference between U.S.-listed companies and Asian companies' response to Section 1502. The Chinese have recently opened a trading post in North Kivu; they make cell phones as well, and do not feel the need to participate in transparency schemes the way Western companies do. And because they know they are the only purchaser in town, they are buying at a steep discount. David Aronson, *How Congress Devastated Congo*, N.Y. TIMES (Aug. 8, 2011), <http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html>.

⁹³ *Global Citizenship*, HEWLETT-PACKARD, <http://www.hp.com/hpinfo/global/citizenship/society/ethics.html> (last visited Dec. 2, 2012).

⁹⁴ *Supplier Responsibility: Labor and Human Rights*, APPLE, <http://www.apple.com/supplierresponsibility/code-of-conduct/labor-and-human-rights.html> (last visited Dec. 2, 2012).

plight on Western minds through shrewd messaging and attention-grabbing headlines, but the issue is whether those marketing techniques will engender a response that addresses the core problems within the D.R. Congo, or just one factor.

There are many issues with reflexive policy implementation that are highlighted in the D.R. Congo crisis. Instead of providing meaningful solutions, the pressure of time tends to give advantages to activist policy groups who have prepackaged purported solutions that can readily be molded into legislation.⁹⁵ The problem is that this type of legislation creates a new rule that favors a specific interest group's agenda, which assuredly does not represent companies' (i.e., shareholders') interests and may not represent all Congolese (i.e., stakeholder) interests, either. In addition, some observers of the D.R. Congo reject the notion that conflict minerals are the primary driver of the humanitarian crisis and contend that disclosures only solve one part of a much more complex problem. Professor Laura Seay argues that while the horrific nature of the violence in the D.R. Congo draws political attention to the area, many have overstated the potential that a traceability and transparency scheme would have for alleviating some of that violence.⁹⁶ Although supportive of international attention and aid, Professor Seay's perspective aligns more closely with Professor Bainbridge's fear of quack federal legislation in times of economic boom and bust.⁹⁷

This seems to be the case with Section 1502, where the Enough Project and other activists pushed through an agenda that narrowly focuses on one policy issue without providing solutions for the many layers of a complex problem. To the extent that the problems in the D.R. Congo are a lack of infrastructure and inadequate medical attention, Section 1502 does not propose a solution. Instead, as Professor Bainbridge cautioned, the Enough Project succeeded in drawing Western attention to the D.R. Congo but failed to address the overarching social problems that require a more comprehensive approach. On the other hand, the Enough Project might have purposefully chosen the only battle they could win in Congress, and some progress in the D.R. Congo is better than the status quo.

⁹⁵ Bainbridge, *supra* note 48, at 1786.

⁹⁶ Seay, *supra* note 4, at 23.

⁹⁷ Bainbridge, *supra* note 48, at 1785–86 (the author defines “quack federal legislation” as the post-economic bubble legislation that tends to favor market regulatory agendas with minimal, if any, substantive legislative deliberation).

Recognizing the inherent limitations of a single activist group, there is certainly reason for optimism that the Enough Project has pushed the social and political discussion of corporate responsibility in a positive direction and shown the path for others to follow.

3. *Distinguishing Section 1502 from Quack Federal Legislation*

Despite the post-bubble legislation that makes up Section 1502, the potential negative impact may not be as troublesome because the law applies to transnational, rather than domestic, business activities. One issue typically raised with reflexive federal legislation is that it takes decision-making away from the laboratory of the states and places it with the federal government, deleting the fifty states' experimental capabilities and placing regulatory power with one legislative body.⁹⁸ A second issue with crisis legislation is that it typically is void of any sunset provisions, which would allow the legislative body or some overseer to revisit the legislation after the time pressure of a crisis subsides. These critiques, although fair as to some Dodd-Frank provisions, are not nearly as damning to Section 1502.

With Section 1502's enactment, the federal government is only one of many bodies attempting to rectify the humanitarian situation in the D.R. Congo. For example, there are numerous other countries and securities exchanges that will not be affected by the SEC's disclosure requirements. While U.S. companies may suffer the consequences of excessive disclosure, the laboratory of international competition will still thrive. Other securities exchanges, although not as financially robust as the United States', including London, Tokyo, and Hong Kong, can allow their companies to compete with the United States' without imposing disclosure requirements. Similar to domestic corporate law where states like Nevada and Pennsylvania are on deck should Delaware stop providing the most advantageous corporate law, other countries could potentially lure companies away from the United States if corporate disclosure requirements become too burdensome.

Another critique of the Dodd-Frank legislation, and Congress when it legislates in crisis situations generally, is that no statutory safeguards, like sunset provisions, are included to allow issues to be revisited when there is more time for deliberation.⁹⁹ Section 1502,

⁹⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that states are "the laboratories of novel social and economic experiments").

⁹⁹ Bainbridge, *supra* note 48, at 1820.

however, does contain a “semi-sunset provision” which allows the President to retract the reporting requirements after five years, presumably when the effects of conflict minerals are diminished.¹⁰⁰ Critics would prefer a sunset provision that allowed for the entirety of the Congressional bill to be revisited, but at least there is room for an overseer to revisit the legislation after the 2008 financial crisis has subsided.

III CHANGES, IMPACT, AND “SOMETHING MORE” (AGAIN)

*“Sunlight is said to be the best of disinfectants.”*¹⁰¹

A. Changes in Corporate Behavior and Impact on Congolese Miners

U.S.-listed corporations have changed their position on conflict minerals, beginning with the SEC releasing its proposed rules. Apple was very much aware of the situation; even the late Steve Jobs, in a personal response to a customer email, addressed the issue directly.¹⁰² Changing the most powerful companies’ and CEOs’ behavior proves that transparency is a powerful tool for shaping corporate social responsibility.

Disclosure provisions, however, can also have unintended consequences. In the case of say on pay, “more disclosure likely allowed executives to know what other executives were paid and to demand higher pay for themselves.”¹⁰³ In this case, the SEC disclosure requirements impose substantial discovery and production

¹⁰⁰ See 15 U.S.C.A. § 78m (2012) (stating that the provision “shall terminate on the date on which the President determines and certifies to the appropriate congressional committees . . . that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals”).

¹⁰¹ *What Publicity Can Do*, HARPERS WKLY. (Dec. 20, 1913) (quoting Justice Louis Brandeis).

¹⁰² See Brian X. Chen, *In E-Mail, Steve Jobs Comments on iPhone 4 Minerals*, WIRED (June 28, 2010, 2:18 PM), <http://www.wired.com/gadgetlab/2010/06/steve-jobs-iphone4/> (statement of Steve Jobs) (“Yes. We require all of our suppliers to certify in writing that they use conflict [free] materials. But honestly there is no way for them to be sure. Until someone invents a way to chemically trace minerals from the source mine, it is a very difficult problem.”).

¹⁰³ Steven M. Davidoff, *Humanitarian Effort in Congo Puts SEC in Unintended Role*, N.Y. TIMES (Aug. 28, 2012), <http://dealbook.nytimes.com/2012/08/28/humanitarian-effort-in-congo-puts-wall-st-regulator-in-unintended-role/>.

costs on companies, likely without proportional social benefits and with potentially negative social impacts.

The effect of Apple's and other corporations' decisions to "exit the D.R. Congo mineral trade means that there is now a *de facto* boycott on Congolese tungsten, tantalum, and cassiterite."¹⁰⁴ Although some companies continue to purchase minerals from the D.R. Congo, the majority of mineral smelting companies, which used to buy from eastern Congo, have stopped. No company wants the stigma of financing African warlords.¹⁰⁵ It is easier to avoid the D.R. Congo altogether and purchase from other, safer, unencumbered countries than to sort out the complexities of Congolese politics.¹⁰⁶

Diminished corporate interest in the Congolese mineral trade has been devastating for local communities.¹⁰⁷ Although "Congolese artisanal miners normally work under horrific conditions for little pay [...] in most mining communities it is the only paid employment available,"¹⁰⁸ and it is still legitimate and legal work for many.¹⁰⁹ With no work alternatives except subsistence agriculture or joining a militia, the Congolese are in trouble. Questions remain about the extent to which the final rules will advance their humanitarian goal or actually make the situation worse.¹¹⁰

American corporate competitiveness further compounds the regulatory environment. There is a possibility that American corporations will suffer market disadvantages without solving the conflict.¹¹¹ This problem not only extends to current U.S.-listed

¹⁰⁴ Seay, *supra* note 4.

¹⁰⁵ David Aronson, *How Congress Devastated Congo*, N.Y. TIMES (Aug. 7, 2011), <http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html> (especially high-profile tech firms like Apple and Intel that are often the end purchasers of these minerals).

¹⁰⁶ *Id.*

¹⁰⁷ Seay, *supra* note 4.

¹⁰⁸ *Id.*

¹⁰⁹ Aronson, *supra* note 106 ("The Rev. Didier de Failly, a Belgian priest who has lived in Congo for 45 years, insistently warned Western advocacy groups of the dangers posed by their campaign. He told them it was no defense for them to claim that they weren't proposing an embargo, since what they were doing would inevitably lead to one.").

¹¹⁰ Davidoff, *supra* note 104 (citing the justification of S.E.C. commissioner, Troy A. Paredes, who voted against the rules because they failed to assess the extent to which they would in fact be successful).

¹¹¹ Aronson, *supra* note 106. The bottom ten of the Enough Project's conflict mineral company rankings list are all Asian companies, for whom these rules are not likely to apply. *Conflict Minerals Company Rankings*, RAISE HOPE FOR CONGO, available at <http://www.raisehopeforcongo.org/content/conflict-minerals-company-rankings>.

corporations, but it might also deter future corporations and mining companies from incorporating in the United States. While the Enough Project remains publically confident that the regulations are working,¹¹² other business groups,¹¹³ and even the Congolese people themselves,¹¹⁴ remain skeptical.

B. “Something More” (Again)

The people of the D.R. Congo agree that it is beneficial to bring greater transparency to their mineral trade. A variety of local and international initiatives were already in place or getting underway when the SEC requirements were enacted. Some groups used tracing tags on mineral bags from conflict-free areas as a way of regulating trade and promoting awareness.¹¹⁵ Groups such as the Electronic Industry Citizenship Coalition, PROMINES, and local coalitions were also involved in creating a solution. Those efforts may now become a casualty of Section 1502.

There are other ways to improve mining conditions without further deteriorating the D.R. Congo’s infrastructure. A few possibilities include providing monetary assistance to affected mining communities,¹¹⁶ hiring displaced workers as taggers or otherwise involving them in the tracing program, and collaborating with local participants to implement Section 1502’s requirements.¹¹⁷ These policies do not necessarily fit well with the shareholder-primacy

¹¹² Davidoff, *supra* note 104 (“According to Darren Fenwick, senior government affairs manager of the Enough Project, ‘Even before implementation, the conflict rules have served as a catalyst for companies and countries to already take steps to prevent usage of illicit conflict minerals.’”).

¹¹³ *Id.* (Thomas P. Quaadman, vice president of the U.S. Chamber of Commerce’s Center for Capital Markets Competitiveness, wrote in the Congressional newspaper *The Hill*, that it was uncertain whether these rules worked and that there was a likely possibility of “negative consequences for American businesses.”).

¹¹⁴ *Digging for Victory*, *ECONOMIST* (Sept. 24, 2011), available at <http://www.economist.com/node/21530110> (“[t]hey denounce the Enough Project, a group backed by several Hollywood stars, that was instrumental in imposing what they call a *de facto* embargo.”) (emphasis added).

¹¹⁵ Aronson, *supra* note 106.

¹¹⁶ CENT, INTELLIGENCE AGENCY, *Congo, Democratic Republic of the*, *THE WORLD FACTBOOK* (2011), <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html> (showing that D.R. Congo joined the Organization for the Harmonization of Business Law in Africa Treaty, with sixteen other African states to facilitate and encourage both domestic and foreign investment in the member states).

¹¹⁷ Seay, *supra* note 4, at 26.

model, but perhaps “something more” than relying on influential, yet misguided corporate disclosure laws is needed to produce acceptable transnational corporate social responsibility.

CONCLUSION

The SEC’s new disclosure rules have changed U.S.-listed corporations’ relationships with conflict minerals. Arguably, shareholders were empowered by increased transparency, and companies have been forced to align with popular demand for conflict-free mineral sourcing. Insofar as corporate accountability is concerned, corporations are exhibiting the substantive behaviors recommended by the SEC’s disclosure provisions. Disclosure provisions at least provide a viable option for regulating transnational corporate social responsibility.

An interwoven issue, however, is whether those changed corporate behaviors address social policy concerns or only burden companies with excessive regulations. The problem is that federal legislatures are promulgating corporate laws that, even if implemented, will not solve the issues they propose to address. For example, despite the overwhelming conversion by American companies to conflict-free sourcing, atrocities continue to plague the D.R. Congo.¹¹⁸ Allowing regulatory laws aimed at corporate social responsibility to be revisited in less reactive times might allow for more thoughtful, meticulous, and effective planning. For example, through recent support from the United States and the Netherlands, a “conflict-free” tagging system being implemented by Congolese authorities is reviving the Congolese mineral trade in certain areas of the country.¹¹⁹ Although difficult to conceive, given the historical boom-bust pattern of corporate regulation, applying resources and regulation in less chaotic times could foster a dynamic, cost-effective, and comprehensive solution. With Section 1502’s sunset provisions available in five years, now would be an ideal time to begin formulating a legislative plan. The Congolese people, U.S. corporations, and humanitarian groups could all benefit from such an arrangement.

¹¹⁸ See Jeffrey Gettleman, *Dire Scene in Congolese City as Rebels Begin to Leave*, N.Y. TIMES (Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/world/africa/alarming-picture-as-rebels-prepare-to-leave-goma.html>.

¹¹⁹ Jonny Hogg, “Conflict-free” tags help revive Congo minerals trade, REUTERS (Nov. 8, 2012), <http://www.reuters.com/article/2012/11/08/us-congo-democratic-mining-idUSBRE8A70PG20121108>.